IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ABDERRAMÁN BRENES-LA ROCHE, PLAINTIFF	:	Civil No. : 08-1815
v.	:	Civil Rights (Police Brutality)
PEDRO TOLEDO DÁVILA	:	JURY TRIAL DEMANDED
JOSÉ CALDERO LÓPEZ	: :	
BENJAMÍN RODRÍGUEZ TORRES,	:	
WALTER RIVERA ORTÍZ	:	
ERIC SERRANO LNU	:	
MERKY VÁZQUEZ SANTOS	:	
JOHN DOE I,	:	
INSURANCE COMPANIES A, B, C	: :	

OPPOSITION TO MOTIONS TO DISMISS
FILED ON BEHALF OF DEFENDANTS
TOLEDO-DÁVILA, CALDERO-LÓPEZ, RODRÍGUEZ TORRES, RIVERA-ORTÍZ,
VÁZQUEZ-SANTELL AND ERICK SERRANO-GONZÁLEZ

Plaintiff, Abderramán Brenes La-Roche, through his undersigned counsel hereby opposes the Motion to Dismiss Pursuant to Rule 12(b)(6) filed on behalf of the above-named defendants In support of which, it is alleged:

INTRODUCTION:

The Complaint alleges, in essence, that defendants violated Plaintiff's clearly established Fourth Amendment right to be free from unreasonable seizure and excessive force and Fifth

Amendment right to substantive due process was violated when, without probable cause or legal excuse (61-62), members of the Police of Puerto Rico San Juan Tactical Operations Unit (better known as the San Juan "Fuerza de Choque" or "Shock Troops") under the command of Defendants Toledo, Calldero, Rodríguez, Rivera and Serrano, detained and beat Plaintiff (Paras. 24-27), as he sat on the floor, breaking his wrist with a baton, continuing to hit and kicked him as he tried to leave the area. Paras. 29-33.

It charges that defendant Sgt. Serrano, after consulting with defendants Rodríguez, Rivera Caldero, and Toledo, ordered defendants Vázquez, Doe and others under his command who had hidden their identification in violation of police regulations, to forcibly remove the demonstrators from the fourth floor of a parking building under construction (Paras. 21, 44), in deliberate or reckless indifference and callous disregard of defendants to the likelihood that members of the "Shock Force" would engage in the conduct that resulted in Plaintiff's injury. Para 43.

It charges that the same unit had used excessive force against demonstrators earlier in that same week (Para. 50-51), and that in fact defendants Toledo, Caldero, Rodríguez, (who supervises the Tactical Operations Divison, Rivera (Commander of the San Juan Tactical Operations Unit) and Serrano rely upon its reputation for excessive force and promote a culture of confrontation and resort to physical force as a means of intimidation and crowd control (Para.52-53). It alleges that those last-named defendants deliberately ignore violation of police regulations requiring officers display their identification while on duty, thereby providing impunity to officers under their command who remove it before assaulting demonstrators, and that their failure to adequately train and discipline police with a known history of violence (Paras

71-72, among others) was a proximate causes of Plaintiff's injury.

Finally, while defendants may, at a later stage, dispute the facts, at this point must accept the allegation that Plaintiff neither committed, nor was charged with any offense in connection with that incident, and that he was neither intoxicated, disorderly, or a threat to anyone's safety. Paras. 61. Indeed, the Complaint asserts that Plaintiff attended a peaceful demonstration as a legal observer, and that that fact was known to defendant Sgt. Serrano and others. Para. 17. Notwithstanding these specific allegations, the Motion posits, at page 2:

> 1) The Complaint does not plead facts sufficient to state a claim upon which relief can be granted;
> 2) Failure to state a cause of action under 42 USC §1983
> 4) Failure to state a cause of action under the Fourth and Fifth Amendments
> 5) Defendants are entitled to qualified immunity
> 6) Pendent claims should be dismissed.

This Court requires no instruction from counsel for either party on the general standard to be used in deciding motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the dispute between the parties in this regard is not about the proper standard, but its application to the facts pled in this Complaint. Plaintiff adopts *Gutiérrez Rodríguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), repeatedly cited at p. 6 of Defendant's Motion as a classic First Circuit point of reference in this regard. See, *also, e.g.*, *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008), *Redondo-Burgos v. U.S. Dep't. of Housing & Urban Dev*., 421 F.3d 1, 5 (1 Cir. 2005).

B. THE WELL-PLEADED FACTS ESTABLISH DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHTS TO BE FREE FROM DETENTION WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION AND EXCESSIVE FORCE AS WELL AS SUPPLEMENTAL STATE CLAIMS.

Plaintiff understands that this is the boilerplate opening salvo in the Department of

Justice's litany of dispositive motions used to forestall litigation of the merits in every civil rights case. It is, however, patently frivolous in this one. The allegations of this Complaint deprive no defendant of his "inalienable right to know in advance the nature of the cause of action being asserted against him," *Rodríguez v. Doral Mortgage Corp*., 57 F.3d 1168, 1171, quoted by defendants at page 5 of the Motion. Rather, Defendants' Motion depends upon (a) misreading of the complaint, (b) adoption of facts proffered by defendants in their Motion but not established in this record, and (c) a cramped and crabbed view of rights protected by the Constitution.

In essence, defendants argue (at page 6 of the Motion) that since Plaintiff is unable to identify the specific officer who fractured his wrist (who had removed his identification), no one is responsible and, that since he admits he was trespassing[1], he deserved to have his wrist fractured. The Motion assumes that giving protesters the alternative of leaping from the fourth floor or running the gauntlet of nightsticks is a perfectly lawful and normal way to handle what was, at worst, a low-key incident resulting in not a single arrest, and that prodding, beating, hitting and kicking a person peacefully seated on the floor not offering any resistance and not presenting any threat is "reasonable.". This is not a picture compatible with respect for the most fundamental human and civil rights, nor with a society based upon law, rather than brute force.

In order to state a claim for illegal detention and excessive force, a plaintiff must allege

[1] The Complaint does not admit any trespass. It denies that any of those present committed any offense under the laws of Puerto Rico, that none were arrested or charged in connection with their presence, and that all those present had legal justification. Finally, even if one or more were arguably guilty of some offense, his presence as a legal observer was privileged. This argument goes only to the legality of the detention. Even if he were guilty of the offense of trespass, the degree of force used on Plaintiff is hugely disproportionate.

(a) that his detention violated the Fourth Amendment and/or the amount of force used to effect it was excessive. *Graham v. Connor*, 490 U.S. 386 (1989). She or he must then allege that the rights violated were clearly established, and that the force used was objectively unreasonalbe under all the circumstances. *Id*., *Saucier v. Katz*, 544 U.S. 194 (2001). And see, additional cases discussed below.

It has long been established that warrantless arrests without probable cause and detentions without reasonable suspicion that the actor is committing, has committed, or is about to commit an offense are per se "unreasonable." *See, eg., Mapp v. Ohio*, 367 U.S. 643 (1961)(Fourth Amendment exclusionary rule mandatory on states); *Terry v. Ohio*, 297 U.S. 1 (1968)(establishing Fourth Amendment standard of investigatory stops and detentions not amounting to arrest); *Tennessee v. Garner*, 471 U.S. 1 (1985)(applying "objective reasonableness" standard to claims based on shooting of suspect "stopped" by bullet); *Graham v. Connor*, *supra* (mistaken investigative stop was objectively reasonable; reasonableness of degree of force used to be judged against an objective standard); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998);United *States v. Khounsavanh*, 113 F.3d 279 (1st Cir. 1997). The " use of force is force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonbleness." *Katz v. Saucier*, 533 U.S. 194, 202 (2001); *Jennings v. Jones*, 479 F.3d 2 (1st Cir. 2007); *Asociación de Periodistas ("ASPRO") v. Mueller, et al.*, 529 F.3d 52 (1st Cir. 2008). *Graham*, *supra*, at 396 lists factors to be considered, discussed below. Force clearly disproportionate to any legitimate purpose is excessive in the Fourth Amendment sense. *See, eg., ASPRO, supra; Jennings, supra*.

The Complaint clearly states, among other allegations discussed in connection with the alleged “failure to state a cause of action for supervisory liability”, *inter alia*, that:

●Plaintiff did not commit, and was not charged with committing any offense. He was neither disorderly, intoxicated, nor a threat to himself or others. Para. 61. The defendants had no warrant and no probable cause or legal excuse to seize or detain him. Para. 62. Rather, he was known to at least Defendant Sgt. Serrano to be an attorney and legal observer for demonstrators. Paras. 4, 16-17;

●Officers Vázquez, Doe and others, acting in concert with each other and under orders from Defendant Serrano, after detaining defendant and others, broke his wrist with a baton, beat and kicked him while he was peacefully seated, in response to his protest of the beating of his son. Paras. 24-37;

●Sergeant Serrano dispatched officers who had removed their identification [in his presence and that of other supervisors on the scene] to the fourth floor for the purpose of removing them by force, after consulting with the higher-ranking defendants who either explicitly or tacitly authorized the force that was used. Paras. 21, 44, 54, 64;

●Defendants Serrano, Rivera and Rodríguez were present at the scene of the demonstration, although not on the fourth floor where the beating took place, while defendants. Toldedo Caldero and Rodríguez are responsible for deciding when to dispatch the Shock Force. Paras. 48-49. Their having done so under similar circumstances at the same site earlier that very week resulted in unlawful and excessive force, their doing so on this occasion, in reckless disregard or callous indifference to a recurrence of lawless violence on the part of members of that Force. Paras. 50-53, 71-72;

●In fact, each defendant relies upon the reputation of the Shock Force for violence to intimidate and attempt to control demonstrations, and create within the unit a culture of confrontation in reckless disregard of constitutional rights. One or more of those involved with the beating and defendant Serrano had lengthy histories of complaints for Fourth Amendment violations for which their superiors failed to impose meaningful sanctions. Paras. 52-56;

●All defendants conspired or acted in concert with each other and other members of the Shock Force to commit the complained-of violations. Para.70;

●Defendants Toledo, Caldero, Rodríguez and Ortíz’failure to train and/or discipline their subordinates with respect to excessive use of force was a proximate cause of Plaintiff’s injuries. Paras 55-57, 65-73.

Based upon the facts alleged in the Complaint, and taking all inferences in the light most favorable to the Plaintiff, it is clear that the defendants collectively neither arrested Plaintiff for any offense he was committing, nor detained him on reasonable suspicion that he had committed any offense. Rather, they went to the fourth floor for the purpose of removing the demonstrators by means of force and violence, which they did A clearer violation of the right to be free from unreasonable seizure and excessive force is hard to imagine.

In addition, it is clear from the Complaint that all the defendants on the fourth floor either participated directly or failed to intervene in a clearly excessive use of force. It can also be inferred that defendant Sergeant Serrano, who was in charge of the unit when it committed similar acts at that site in the recent past, either ordered such violence to be used or was, at least recklessly indifferent to the likelihood that those he dispatched to the fourth floor with their identities hidden would repeat their earlier performance, relying on the fact that he and his superiors would protect, if not reward them.

Defendants' argument, at page 6, is that "none of the appearing defendant's [sic] had any direct involvement with the damages" may be their defense at trial, but it is not established from the Complaint. Defendants equate wielding the baton that broke the wrist with "direct involvement with the damages." While the Shock Force officers (including defendants Vázquez and Doe, see Complaint, ¶¶29-33) who were on the fourth floor were the ones wielding the batons beating Plaintiff and his son, Defendant Serrano ordered them there knowing they had removed their badges, and knowing that they had resorted to violence in an earlier recent encounter with demonstrators, as did other superior officers on the scene.

Whatever factual or legal controversies may subsequently develop, it cannot be seriously argued that any defendant is left in the dark about how it is alleged that he violated Plaintiff's right to be free from unreasonable use of force, and that some act of each defendant caused or contributed to his injury. Defendants do not otherwise attempt to argue that the right to be free from unreasonable seizure or detention and the right to be free from unreasonable force were not clearly established under the Fourth Amendment. Any effort to do so would be futile. *See*, ASPRO, Jennings, *supra*.

B. THERE ARE NO CLAIMS OF LIABILITY BASED UPON *RESPONDEAT SUPERIOR*.

After a lengthy disquisition on the non-issue discussed above (Defendants' Motion at 7-8), Defendants complain that plaintiff's allegations of failure to train and supervise are vague and conclusory. Thus, this argument implicitly acknowledge, they do not depend upon a theory of *respondeat superior*.

42 U.S.C. §1983 imposes liability on any person who "subjects, *or causes to be subjected*" another person to violation of constitutional rights under color of law. It requires not direct on-the-scene participation, but an affirmative causal link between the "street-level misconduct and the action, or inaction, of the supervisory officials." *See, e.g.*, *Gutiérrez Rodríguez v. Cartagena*, 882 F.2d 553, 5561-562 (1st Cir. 1989). A "known history of widespread abuse sufficient to alert a supervisor to ongoing violations" is one such link. *Id*.

When there is no direct, on-the-scene participation, a supervisor will be liable when (1) the behavior of his or her subordinates results in a constitutional violation and (2) the supervisor's action or inaction was affirmatively linked to the subordinate's behavior in a manner that could be characterized as either 'supervisory encouragement, condonation or acquiescence' or 'gross negligence . . . amounting to deliberate indifference.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1379-80 (1 Cir. 1995)(quoting *Lipset II v. University of Puerto*

Rico, 864 F.2d 881, 902-903.

This has been done here. The paragraphs of the Complaint cited in the previous sections (especially Paras. 47-56, 64-72) makes clear that at this stage, prior to any discovery, Plaintiff has adequately notified each defendant of what he is alleged to have done or failed to do. The allegations may be made more specific upon receipt of discovery, so that, for example, the identities of the officers and the numbers of prior complaints for brutality can be identified. The Complaint specifically alleges that "defendant Serrano communicated from the scene with each of the defendants Toledo, Calero, Rodríguez and Rivera, kept them informed of developments, consulted with them and obtained their orders or permission to proceed as he did," (Complaint, Para 54) and that the decision to deploy the "Shock Force" after its use of excessive force against demonstrators there earlier that same week was made by defendants Toledo, Caldero and Rodríguez in reckless disregard or callous indifference to the likelihood it would recur, predictably resulting in Plaintiff's injury. *Id*. Paras. 49-55. While it should not require a specific allegation to show that these supervisory officials knew of the violence recently inflicted by this same group of their subordinates (the San Juan Tactical Operations group, known as the "Shock Force") in relation to the ongoing demonstrations at the same site, the Complaint could easily be amended to add that reports about this violence were broadcast by contemporary media.

The Complaint also alleges, at Paras. 44- 48, that the failure of defendants Toledo, Caldero, Rodríguez, Rivera and Serrano to enforce department regulations require police on duty to display their identification encouraged the use of unlawful force by offering immunity to officers, such as the defendant members of the Shock Force who did so here in the presence of Defendant Serrano as well as other defendant superior officers on the scene.

Again, while defendants may dispute the facts, their Motion under Rule 12(b)(6) is not the vehicle for doing so. This is not a case in which there are no allegations of personal responsibility. *See, e.g.*, *Maldonado Denis v. Castillo Rodríguez*, 23 F.3d 576 (1st Cir. 1994). Personal responsibility does not mean wielding the baton, and does not require presence at the scene. *See, e.g.*, *Whitfield v. Melendez Rivera*, 431 F.3d 1, 14 (1st Cir. 2005)("Supervisory liability can be grounded on either the supervisor's direct participation in the unconstitutional conduct, or through conduct that amounts to condonation or tacit authorization."). It may be established either by direct participation in the unconstitutional conduct, or by conduct that amounts to condonation or tacit authorization. *See*, *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir. 1999).

C. THE COMPLAINT CLEARLY STATES A FOURTH AMENDMENT CAUSE OF ACTION.

This ground appears redundant with the first, but as Defendants raise it twice, Plaintiff makes this separate response incorporating Section A by reference.

As acknowledged by Defendants, in order to establish a violation of the Fourth Amendment, a plaintiff must show that the defendant, a police officer acting under color of law, employed force against a detainee that no reasonably well-trained officer could have believed was objectively reasonable under the circumstances. *Graham v. Connor*, *supra*. (1989). A "seizure" or "detention" is effected, for Fourth Amendment purposes, when government actors have "by means of physical force or show of authority . . .. in some way restrained the liberty of a citizen." *Id*. at 399, n. 10, quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16. The "reasonableness"of a particular seizure depends upon when it was made and how it was carried out. 490 U.S. at 395. "Reasonableness" is an objective inquiry, determined "in light of the facts and circumstances confronting [the officers]", *Id*. at 397. While it is a test that resists mechanical application, it has certain touchstones requiring "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is resisting arrest or attempting to evade arrest by flight. . . ." *Id*. at 396.

The facts alleged in the Complaint neither gave Defendants any reason to arrest or detain Plaintiff, nor to use any degree of force against him. At this stage the facts must be construed against them; the fact that they arrested no one suggests that they had no basis to do so. They did not need to temporarily detain and investigate those on the fourth floor; the police knew that the demonstrators intended to demonstrate their opposition to the project. And once the members of the "Shock force" reached the Fourth Floor, they did not make an announcement requiring the demonstrators to leave, but rapidly starting cutting a swath with their clubs.

With respect to whether Plaintiff was detained, the Complaint alleges that certain defendants "closed off the only means of egress from the fourth floor," and restricted his freedom of movement by announcing that he would he had to leave by either leaping from the fourth floor or running the gauntlet of their nightsticks. Complaint Para 24. When, in order to avoid the violence threatened by the police, he sat on the floor, the officers came closer, batons at the ready, and ultimately charged, batons swinging, and continued to beat him and others as they tried to go downstairs once the police ceased blocking them. Complaint, Para. 25-32.

When Plaintiff complained about the beating of his son, one of the officers told the others to "leave that one to me." Complaint, Para. 30. Whereupon one broke his wrist while others hit and kicked him. *Id*. Para. 31.

Given that the Complaint alleges there was no legal cause or excuse to detain Plaintiff (*id*. 62) , that he never committed nor was charged with any wrongdoing (*id*. 61), and that he was at the relevant time peacefully seated and no threat to any one (*id*. 37), arguing that it fails to allege a violation of the Fourth Amendment shows little respect for that Constitutional right.

First, defendants do not establish probable cause to arrest, period. Here, once again, in order to make a plausible argument, Defendants presume it is obvious that they had justification to arrest Plaintiff without explaining why they failed to charge him. Second, even assuming *arguendo* justification for a the detention were established from the Complaint, Defendants fail to explain why it was reasonable to break Plaintiff's wrist. Rather, they seek to characterize it as a "push or shove" such as is a normal incident to any lawful arrest or detention. Motion at page 9. Third, they also dispute the facts alleged in the Complaint to argue that "Plaintiff and the demonstrators, instead of leaving the private property, **chose to disobey the police's orders** and instead sat down." *Id.* at 9. This assumes that the choices offered by the Shock Force (according to the complaint)–leaping from the Fourth floor or running the gauntlet of nightsticks– was reasonable. Defendants also argue that the officers' merely standing shoulder to shoulder "does not amount to the deprivation of any constitutional right." *Id*. at 10. Of course it doesn't. Nor does the Complaint allege it does.

While the Motion seeks to both add and subtract facts, it fails toshow either the legality of the detention or the reasonableness of the force used. A Motion to Dismiss is not the place to dispute the facts. Those alleged in the Complaint, not inherently incredible or mere legal conclusions, are those the Court must take as true at this stage of the proceedings. Plaintiff's complaint is not that the defendants stood shoulder to shoulder, nor that they gave an order to leave, but that they violated his rights by doing those things without any allowing him to leave without suffering painful and disabling summary punishment at their hands.

D. 42 U.S.C. §1983, DUE PROCESS, THE FIFTH AND THE FOURTEENTH AMENDMENTS

The Fifth Amendment to the Constitution of the United States provides that "no person shall . . . be deprived of life, liberty or property without due process of law." The Fourteenth Amendment makes that substantive right applicable to states, so that they are bound to respect the same right of due process as the federal government. Due process has both substantive and procedural aspects.

Puerto Rico's singular relation to the United States has left the Supreme Court unable or unwilling to decide whether the right of Due Process applies to citizens of Puerto Rico by means of the Fourteenth Amendment (as if it were a state), or directly, by means of the Fifth. *See, e.g.*, *Calero Toledo v. Pearson Yacht Leasing, Inc*., 416 U.S. 663, 668 (1974). But it has never suggested it does not apply, via either the Fifth or Fourteenth Amendments at all. If choice of the Fifth Amendment as the source of that right in Puerto Rico has created confusion, the Complaint can be amended to clarify that the claim is made under the right to substantive due process guaranteed by the Fifth "and Fourteenth" Amendments.

Nor has the Supreme Court held, as defendants seem to believe, that a claim for violation of due process cannot be stated against an individual acting under color of state, rather than federal, law. *See*, *e.g*, *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and discussion in *Torres Rivera v. O'Neill Cancel*, 406 F.3d 43 (1st Cir. 2005). *And see, e.g., Maymi v. Puerto Rico Ports Authority*, 515 F.3d 20, 30 ("A substantive due process claim requires allegations that the government conduct was, in and of itself, inherently impermssible irrespecive of the availability of remedial or protective procedures”). While Plaintiff alleges in the Complaint that his beating at the hands of some defendants constituted an “excessive force” violation of the Fourth Amendment, defendants, predictably, dispute that the Fourth Amendment applies at all because he was not under formal arrest and never charged. Motion at 13 (“the allegations . . . does [sic] not show that Plaintiff was seized for purposes of the Fourth Amendment”.)

However, independent of that violation, the behavior of at least some defendants (including those not on the scene of the beating) may violate the Fifth Amendment. The Complaint alleges, and Plaintiff believes discovery will how that Defendants Serrano, Rivera and possibly Ortíz and Toledo ordered those who went to the fourth floor of the parking building under construction to “clear it”, relying upon the policy and practice of the “Fuerza de Choque” of San Juan to resort to brute force attempt to break up demonstrations, as they had on earlier recent occasions at Paseo del Caribe, in part because Defendants Toledo, Ortíz and Rivera failed to properly train and supervise members of this unit in defusing protest and appropriate means of clearing spaces occupied by demonstrators. Without discovery, Plaintiff cannot establish all the precise fact. However, under a scenario in which one or more of defendants Toledo, Caldero, Rodríguez or Rivera either gave an order such as “*sáquenlos a palo limpio*” (roughly, “get them out of there by force of blows”) or tacitly authorized those on the fourth floor to proceed as they did because they saw the use of violence as the most efficient tool for solving the problem of continuing demonstrations, the resort to bone-breaking force over the rule of law would surely be sufficiently “conscience-shocking” to amount to a deprivation of the right to substantive due process under either the Fifth or Fourteenth Amendments, rather than, or in addition to, any

Fourth Amendment violation by defendants actively involved in detaining or restraining Plaintiff.

Defendants' argue, in essence, that Plaintiff has no ground to complain because he violated the law, and thus, in essence, "got what was coming to him" (both he and the demonstrators were illegally trespassing private property therefore, . . . expect to be detained and/or arrested . . . (Motion at 12), and "due to the demonstrators' failure to leave, a reasonable response by the police officers would be to remove said people from the premises . . .(id. at 10)." Of course, for purposes of qualified immunity, they also argue that "the factual allegations taken in the light most favorable to the party asserting the injury does [sic] not show that Plaintiff was seized for purposes of the Fourth Amendment." *Id*. at 12-13. Even if that were true for one or more defendants, that would not resolve the Fifth Amendment claim. "Even if there is no "seizure" for Fourth Amendment purposes, a constitutional claim of conscience-shocking force can be made out against an officer under substantive due process principles," *Rodríguez Rodríguez v. Ortíz-Velez*, 391 F.3d 36 (1st Cir. 2004), citing *County of Sacramento v. Lewis*, *supra*. In *Lewis*, the Supreme Court explicitly held that where conduct does not fall within a more specific provision of the Constitution (such as the Fourth Amendment), it may constitute a substantive due process violation. "The touchstone of due process is protection of the individual against arbitrary action of the government." 523 U.S. at 845. While it is only the most egregious conduct that is "arbitrary in the constitutional sense," Id. at 846 (citation omitted), such conduct is actionable as a violation of substantive due process.

Under *Lewis*, while there is no "calibrated yard stick" (*id*. at 847) to determine what behavior is objectively conscience-shocking, it traced a continuum which leaves mere misjudgment in the heat of split-second decision-making on the negative side of the equation, and acts intended to harm on the positive. The complaint clearly states acts on the positive side; if defendants believe there are facts to show the contrary, they will have to produce them.

When officers of the Police of Puerto Rico choose to use or direct others to use bone-breaking force to evict an unarmed, non-threatening person because he protests the beating of his son, or because they have decided both are "trespassers" without recourse (either before or after) to the impartial judgement of the courts regarding the rights of either the alleged property owners or the demonstrators, its citizens are deprived not only of specific procedural rights, but of respect for that fundamental choice made by the Constitution for legal process over brute force. Both the decision to abandon the law made by those charged with enforcing it and the wantonness with which indefensible force was applied with impunity are "conscience shocking", and cry out for application of the Civil Rights Act, designed for the purpose of protecting citizens from such violations.

Superior officers may not escape liability by asserting that they had nothing to do with any Fourth Amendment violations because they were far from the scene. The Complaint alleges that Plaintiff's broken wrist and other injuries was not the result of an unforeseeable police riot by some bad apples, but the result of reckless indifference or callous disregard of supervisors who, among other things, ignored repeated similar violations of regulations, thereby offering immunity to members of the Shock Force who resort to violence. See, Complaint at Paras. 43, 47-56, 64-72. We cannot claim to live in a regime of Due Process if our courts tolerate the use of specialized "Shock Forces" that are allowed to violate regulations (e.g.., requiring the display of identification) in order to distribute summary physical punishment *ad libitem* without fear of consequences. Because the Complaint clearly alleges both Fourth and Fifth Amendment violations, the Due Process claims cannot be dismissed under Rule 12(b)(6).

F. THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY IS NOT ESTABLISHED BY THE COMPLAINT.

Defendants' motion to dismiss on the ground of qualified immunity is also frivolous. *See, e.g., Jennings v. Jones*, *supra*. Or, as a panel of this Circuit put it most recently, "[t]o establish a Fourth Amendment excessive force violation, the plaintiffs must show that the defendants employed force that was unreasonable under the circumstances." *Asociación de Periodistas v. Mueller*, *supra*. And see, *Saucier v. Katz*, *supra* (outlining procedure for analysis of excessive force claims under 42 U.S.C §1983).[2]

In *Graham*, *supra*, the Supreme Court established the elements of the kind §1983 Fourth Amendment claim asserted here: (a) the complainant was in some way stopped, detained or seized by law enforcement personnel in a manner that (b) violated clearly established law which (c) a reasonably well-trained officer would know that the degree of force used was objectively unreasonable.

There, because "the plaintiffs' submissions reveal that without any provocation or need for force, the defendants assailed them," without "specific evidence of a potential public safety threat or other law enforcement consideration" the Court of Appeals reversed the dismissal on qualified immunity grounds (on summary judgment) because mere obstinance by a crowd of

[2] In the context of summary judgment, a court considering a claim of qualified immunity must first determine whether the plaintiff's Fourth Amendement right to be free from unreasonable seizures was violated; if it was, the court must decide that right was "clearly established" at the time of the events, and finally, whether the "officer's mistaken understanding as to what the law requires is reasonable." 523 U.S. at 205.

unruly demonstrators clearly did not warrant a "show of force" that included hitting, kicking and use of batons and pepper spray. Here, while the Complaint does not allege damages caused by pepper spray, it alleges a broken wrist inflicted upon a seated, non-resisting lawyer protesting the beating of his son in the context of deliberate and concerted use of brutality by the police. If any Defendant believes that to be reasonable, Plaintiffs have made their case with respect to the failure to train and supervise claims against defendants Toledo, Caldero, Rodríguez and Rivera.

The Complaint clearly establishes that notwithstanding the lack of formal charges or handcuffs, Plaintiff was detained by defendants when they closed off egress from the fourth floor as described in Paras. 24-27. The second issue is whether his detention and/or the use of force established some clearly established law. Defendants argue that because (in their view), Plaintiff was "illegally trespassing private property, therefore, a reasonable person similarly situated, can expect to be detained and/or arrested . . ." (Motion at p. 12)). This twists the reasonableness inquiry established in *Graham v. Connor*, in the wrong direction. The issue is not whether a reasonable person in Plaintiff's position should expect to be arrested, but whether a reasonably well-trained police officer should have known that his or her arrest or use of force would violate the Constitution. *See*, *Harlow v. Fitzgerald*, 427 U.S. 808, 818 (1982), *Graham*, *supra*, *County of Sacramento v. Lewis*, *supra*. The answer to that question here is, "of course."

WHEREFORE, the plaintiff opposes the motion and requests it be DENIED in all apsects.

CERTIFICATION

I hereby certify that on this date, the foregoing was electronically filed with the Clerk of the Court via CM/ECF system, which will cause a copy to be electronically served upon the

United States Attorney's Office and counsel for all codefendants.

Dated: 24 December 2008

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